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84-346

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARRY MINTZES, Warden,

Petitioner,

v

ROY WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Thomas A. Kulick (P16290)
Assistant Attorney General

Corrections Division
Criminal Appeals Section
Plaza One Building
401 S. Washington Square
Lansing, MI 48913
Telephone: (517) 373-3474

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WITH REGARD TO WHETHER THE TEST OF INEFFECTIVE ASSISTANCE OF COUNSEL OF STRICKLAND v WASHINGTON, ___ US ___; 104 S Ct ___; 80 L Ed 2d 674 (1984), IS APPLICABLE TO CLAIMS THAT STATE COURT DEFENSE COUNSEL'S MISCONDUCT EVIDENCED AN IRRECONCILABLE CONFLICT BETWEEN THE INTERESTS OF COUNSEL AND DEFENDANT.

II.

WHETHER THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION REGARDING WHETHER FINDINGS OF FACT BY A STATE COURT SHOULD BE ENTITLED TO A PRESUMPTION OF CORRECTNESS UNDER § 2254(d), 28 USC § 2254(d), WHEN THERE IS A CLAIM OF THE INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON ATTORNEY MISCONDUCT DURING TRIAL.

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OPINIONS BELOW

Respondent Wilson was first jury-convicted of carnal knowledge of a female over the age of 16, MCL 750.520; MSA 28.788, and sentenced to life imprisonment on February 13, 1974. The Michigan Court of Appeals affirmed in an unpublished *per curiam* opinion, *People* v *Roy Wilson*, No. 20284, decided March 27, 1975. Thereafter the Michigan Supreme Court in a published opinion reversed the conviction on the grounds that Petitioner should have been given a continuance following the prosecution's late endorsement of two expert witnesses and remanded the case for a new trial. *People* v *Wilson*, 397 Mich 76 (1976); *reh den* (without opinion), 397 Mich 962 (1976).

Respondent was thereafter retried in the Recorder's Court for the City of Detroit. On December 9, 1976, Respondent was again jury-convicted of carnal knowledge of a female over the age of 16, MCL 750.520; MSA 28.788. He was again sentenced to life imprisonment. The Michigan Court of Appeals

again affirmed Respondent's conviction in an unpublished *per curiam* opinion, *People* v *Roy Wilson,* No. 77-613, decided November 8, 1978. (App 23a-26a) The Michigan Supreme Court denied Respondent's Delayed Application for Leave to Appeal without opinion in a published order, *People* v *Wilson,* 407 Mich 881 (1980).

On April 14, 1980, Respondent filed an application for habeas corpus in the United States District Court for the Eastern District of Michigan alleging a violation of his Sixth Amendment right to the effective assistance of counsel. The application was denied in a written opinion dated June 9, 1981, by United States District Judge Charles W. Joiner. (App. 13a-23a). The District Court concluded that Respondent had not received a constitutionally unfair trial. (App. 22a). Respondent thereupon appealed the District Court decision to the United States Court of Appeals for the Sixth Circuit. In an opinion filed on May 4, 1984, a panel of the Sixth Circuit found a Sixth Amendment violation, and reversed and remanded the case to the District Court with instructions to grant the writ of habeas corpus. *Wilson* v *Mintzes,* 733 F2d 424 (CA 6, 1984). (App. 1a-10a.)

The Sixth Circuit thereafter denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc by Order filed June 22, 1984. (App. 11a).

On July 12, 1984, the Court of Appeals granted Petitioner's Motion for Stay of Mandate Pending Application for Certiorari in this Court. (App. 12a).

JURISDICTION

Petitioner seeks review of the Court of Appeals Opinion filed May 4, 1984. (App. 1a-10a). Rehearing was denied June 22, 1984. (App. 11a). This Court's jurisdiction is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

US Const, Am VI, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

28 USC 2254(a) provides:

> Federal Habeas Corpus relief is available to a state prisoner:
>
> ". . . only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 USC 2254 (d) provides, in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . ."

STATEMENT OF THE CASE

Respondent, Roy Wilson, was convicted of carnal knowledge of a female over 16 (i.e., rape), under the then controlling Michigan statute, MCL 750.520; MSA 28.788.[1]

Trial evidence established that on the night of October 11, 1973, the complainant, Ethel Mills, was kidnapped at gunpoint by Respondent and a young woman as she walked along a street on the east side of Detroit. (TII, Vol II, p 8).[2]

Ms. Mills was placed in Respondent's car where she was made to kneel in the back seat with a jacket over her head (TII, Vol II, pp 9, 10). She was then taken to a house where Respondent told Ms. Mills he would kill her for selling drugs to his sister; he told his companion to call someone who would presumably identify Ms. Mills as someone who sold drugs to his sister. While they waited Respondent said he may as well entertain himself (TII, Vol II, pp 12-15). Respondent forced Ms. Mills to take off her clothes and lay on a tablecloth on the floor (TII, Vol II, p 15). Respondent took a polaroid photograph of her, then forced her to have intercourse with him (TII, Vol II, pp 16-18). Respondent then took more nude photographs of her.

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[1]

The provisions of MCL 750.520; MSA 28.788 have been repealed and the Michigan Criminal Sexual Conduct Law, MCLA 750.520(a) *et. seq.*; MSA 28.788(1) *et. seq.*, adopted in its place.

[2]

The letter "T" refers to the transcript of trial, the Roman numeral "I" to Respondent's first trial, the Roman numeral "II" to Respondent's second trial, the Roman numeral following "Vol" to the volume in the trial, and the Arabic numeral to the page within the particular volume of transcript.

The victim further testified that she was then led out of the house with her jacket placed over her head and was returned to Respondent's car. She was let out in the Indian Village section of Detroit where she found an unmarked police car, (TII, Vol II, p 19). She related her story to the police officers and identified Respondent, who was still in his car, to police officers. Respondent was immediately arrested (TII, Vol II p 20).

Debra Coleman, a juvenile at the time of the incident (TII, Vol II, pp 49-50), was called to testify by the prosecution. She told the jury that she was the Respondent's companion during the course of the rape of Ms. Mills (TII, Vol II, p 53). Ms. Coleman described Respondent's scheme for the jury.

Coleman testified Ms. Mills entered the car and entered the back seat (TII, Vol II, p 55). The victim was kneeling on the floor of the back seat, crying (TII, Vol II, p 57). They proceeded to Respondent's house, the same house to which the witness later took Detective Audrey Martini a few days later (TII, Vol II pp 57, 66). When they got to Respondent's house Respondent led the victim from the car into the house, her head being covered with her jacket (TII, Vol II p 60).

According to Ms. Coleman, Respondent had a gun both in the car and in the house (TII, Vol II, p 60). Once in the house, Respondent told the witness to get a sheet and then to get the camera (TII, Vol II p 60). Respondent Wilson then put the sheet on the floor and took pictures with the camera (TII, Vol II, p 61); Respondent had intercourse with the victim; Respondent took more pictures of the victim naked on the sheet (TII, Vol II, pp 62-64). She also testified that Respondent told her to call somebody about drugs; it was a fake phone call (TII, Vol II, pp 61, 62); she called no one.

She also told the jury that Ethel Mills was crying during the entire ordeal (TII, Vol II, pp 63-64). After dressing, Respondent removed Ms. Mills from the house, her head again being covered by her jacket (TII, Vol II, p 65). Ms. Mills was returned to Respondent's car where she was again placed down on her knees in the back seat (TII, Vol II, p 65). Respondent and Ms. Coleman drove her a short distance, then let Ms. Mills out of the car (TII, Vol II, p 65). A few minutes later police arrested both the witness and Respondent (TII, Vol II, p 65).

The witness' testimony thus fully corroborated the testimony of Ethel Mills.

Detroit Police Lieutenant Richard Haase also corroborated Ms. Mills' testimony concerning her description of the offense, identification of Respondent, and the immediate arrest, search of Respondent's car and seizure of the gun (TII, Vol II, pp 75-78).

Additional corroborative testimony was presented by other Detroit police officers, some of whom were involved in arresting or transporting Respondent and his companion to jail, and others who transported Ms. Mills to the police station and hospital.

Sergeant Audrey Martini testified. She indicated she was the officer in charge of the case. She indicated she first became involved with the case on the morning of October 12th when she was assigned the case and received some evidence (pantyhose) which had been earlier seized by another police officer, Officer Mary Haslitt (TII, Vol II, p 92). Sergeant Martini testified that she conducted a search of Respondent's apartment with a warrant and seized a photograph, a camera, a polaroid camera with flash attachment, and the residue of a polaroid photograph of Ms. Mills from the place where

the rape of Ms. Mills occurred (TII, Vol II, pp 93-94). After identifying the items seized Sgt. Martini was turned over for cross-examination.[3]

After Respondent's counsel asked Sgt. Martini a few questions, he requested a copy of the search warrant. Sgt. Martini said she didn't have it; counsel asked for it from the court file. After the prosecutor offered Respondent's counsel his copy of the search warrant the jury was excused. Out of the presence of the jury the Court's attempt to scold counsel about his trial preparation turned into a heated exchange. During the course of the exchange the Court asked Respondent if he wanted to discharge the attorney; the Court permitted Respondent to meet and consult with his family. The exchange between counsel and the Court continued, with counsel indicating to the Court his knowledge and preparation in the case. Respondent's counsel remained argumentative and attempted to leave the courtroom. The Court refused. The Respondent's trial counsel moved for a mistrial based

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[3]

In Respondent's first trial, Ms. Mills had testified she told Sgt. Martini that she had left her lavendar colored panties at the Respondent's apartment after cleaning herself with them (TI, Vol I, p 97). When Det. Martini was later cross-examined about what was seized when she searched Respondent's apartment with a search warrant, she said she didn't find the panties as described. She clarified her answer on re-direct examination, indicating that she really had located five pairs of panties in Respondent's apartment, two of which were lavendar. Since she didn't know which pair of lavendar panties the search warrant allowed her to seize, she left all of them there. No testimony about panties occurred on direct examination in the second trial. Further inquiry into this topic or the execution of the search warrant would have opened the door to this incriminating testimony.

It should also be noted that in Respondent's first trial, Sgt. Martini had testified to the contents of a post-arrest statement Respondent gave to her which was inconsistent with Respondent's defense of consent at the second trial. Sgt. Martini had not been asked about the statement in the second trial.

upon the events which occurred out of the jury's presence; the trial court denied the motion. Immediately prior to the Court's summoning the jury, Respondent's attorney told the Court he still represented the Respondent, had not been discharged, and that he instructed his client "not to answer anything—nobody's questions." (TRII, Vol II, P 106; App. 34a). The Court summoned the jury in order to continue the trial; the Respondent's attorney, in defiance of the Court's direction, indicated "We're not going to continue the trial." (TII, Vol II, P 107; App. 34a)

When the jury returned to the courtroom, trial counsel continued to carry-on and misbehave before the jury, defying the Court's instruction to continue the trial. Petitioner's counsel then indicated before the jury that he would not proceed with the case and indicated he was no longer Respondent's attorney (TII, Vol II, P 108; App 39a). Immediately thereafter he again moved for a mistrial on Respondent's behalf, which the Court denied (TII, Vol II, P 109; App. 36a).

The proceedings were then adjourned to the next day, Wednesday, December 8. Before the jury was returned to the courtroom, Respondent's attorney addressed the Court, explaining his position regarding his preparation for trial. The Court appeared satisfied. (TII, Vol III, P 7; App. 37a). Respondent Wilson expressed dissatisfaction with the preceding day's events, claiming his belief that they affected his receipt of a fair trial. The Court rejected the contention, finding that the events occurred out of the jury's presence, except for some comments made by the attorney (TII, Vol III, P 7; App. 37a).

Trial thereupon continued without incident. The prosecution called five additional police officer witnesses, three of whom were involved, along with Sergeant Martini, in the preparation and execution of the search warrant for site of

the rape. None were cross-examined regarding the search or the fruits of the search. Respondent's trial counsel also declined the further opportunity to cross-examine Sergeant Martini (TII, Vol III, P 2; App. 37a). The decision not to further cross-examine Sergeant Martini or the other police officer witnesses appears to have been the result of a deliberate trial tactic and not the product of any unwillingness or inability to protect Respondent's interests. The decision appears to be tactically consistent with the defense of "consent."

At the close of the prosecution's case, the Respondent's trial counsel requested the court to *voir dire* the jury "with respect to the events which took place on Tuesday, as to whether or not they heard anything that would prejudice them in deciding this case." (TII, Vol IV, P 8; App. 38a).

The Court then asked the jury if any of them were or had become biased or prejudiced because of the conduct of either attorney during the trial, and whether the conduct of either attorney would affect their decision. No juror responded that the conduct of either attorney would affect their decision in the case. The Court also inquired whether each juror would decide the case on the merits. No juror indicated that a decision would be based on anything except the evidence. (TII, Vol IV, P 11-12; App. 40a, 41a). The Court then concluded that neither the jury nor any individual juror was prejudiced by the misconduct of either attorney (TII, Vol IV, P 10-12; App. 40a-41a). Thus the Court made a factual finding that nothing that took place during the course of trial would affect the jury from deciding the case fairly.

The defense then presented the testimony of one witness, a Sara Patterson, to support its theory of consent. The gist of the testimony which Ms. Patterson offered was that an Ethel Mills, whom she knew as "Gerry", was a prostitute, had

told her in October or November of 1973 that a person named "Roy" had cheated her out of her fee and didn't give her the money she asked him for, and that she was going to call the police and have him picked up for rape. Respondent argued consent as the defense, acknowledging that Respondent had indeed had sexual intercourse with the victim at the time and place set forth in the complaint. (TII, Vol IV, P 40; App. 43a). After instructions the jury deliberated and thereupon convicted Respondent of the offense for the second time.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WITH REGARD TO WHETHER THE TEST OF INEFFECTIVE ASSISTANCE COUNSEL OF STRICKLAND V WASHINGTON, —— US ——, 80 L Ed 2d 674, 104 S Ct. ——, (1984), IS APPLICABLE TO CLAIMS THAT STATE COURT DEFENSE COUNSEL'S MISCONDUCT EVIDENCED AN IRRECONCILABLE CONFLICT BETWEEN THE INTERESTS OF COUNSEL AND DEFENDANT.

In this case the Court of Appeals concluded that one incident, (an outburst before the jury by Respondent's attorney following an exchange with the trial judge out of the jury's presence), which occurred during the course of Respondent's second rape trial deprived Respondent of the effective assistance of counsel, despite the fact that the trial court, at the request of Respondent's counsel, inquired whether the attorney's conduct prejudiced the jury against Respondent and they denied it did, and despite the fact that the Court then cautioned the jury that they were to disregard the conduct of

the attorneys and base their decision only on the evidence in the case. The Court of Appeals coupled trial counsel's conduct with a failure to cross-examine Police Sgt. Audrey Martini and held that these acts evidenced an irreconcilable conflict between the interests of Respondent and counsel such that Respondent was denied the effective assistance of counsel. The Court of Appeals, however, did not determine whether Respondent's trial counsel's conduct so affected the outcome of the trial so as to render the jury's verdict untrustworthy and unreliable.

In *Strickland* v *Washington, supra,* 80 L Ed 2d at 696-697, this Court determined that even in cases involving actual conflict of interest, "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests,' *and* 'that an actual conflict of interest adversely affected his lawyer's performance.' *Cuyler* v *Sullivan* [446 US] at 348, 350 . . ." (Emphasis added).

In this case the Court of Appeals concluded that trial counsel's performance was evidence of an irreconcilable conflict of interest. The Sixth Circuit did not, however, determine that the apparent conflict between Respondent and his attorney actually influenced the outcome of Respondent's trial.

To the extent that *Strickland* v *Washington, supra,* requires that both elements of cause and prejudice be found, the failure of the Sixth Circuit to find that trial counsel's performance resulted in Respondent receiving a trial whose result is unreliable was error and should be reversed.

II.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION REGARDING WHETHER FINDINGS OF FACT BY A STATE COURT SHOULD BE ENTITLED TO A PRESUMPTION OF CORRECTNESS UNDER § 2254(d) 28 USC § 2254(d) WHEN THERE IS A CLAIM OF THE INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON ATTORNEY MISCONDUCT DURING TRIAL.

This case presents the issue whether an attorney's misbehavior in front of a jury raises a Sixth Amendment claim of ineffective assistance of counsel and, if so, to what extent must a state court's determination that no prejudice occurred be given deference under § 2254(d).

In *Strickland* v *Washington,* 80 L Ed 2d at 700, this Court stated:

> "Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of 'basic, primary, or historical fact[],' *Townsend* v *Sain* 372 U.S. 293, 309, n.6, 9 L Ed 2d 770, 83 S Ct 745 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See *Cuyler* v *Sullivan,* 445 U.S., at 342, 64 L Ed 2d 333, 100 S Ct. 1708. *Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),* and although District Court findings are subject to the clearly erroneous standard of Fed. Rules Civ. Proc. 52(a), both the performance and prejudice com-

> ponents of the ineffectiveness inquiry are mixed questions of law and fact." (Emphasis added.)

In so ruling this Court recognized that both the performance and the prejudice components of the question of whether a criminal defendant's trial counsel rendered constitutionally effective representation was a mixed fact-law determination. As this Court noted, state court fact findings on the issue are binding upon a federal habeas court, but not the legal determinations derived therefrom.

In *Smith* v *Phillips*, 455 US 209 (1982), a convicted murderer challenged his conviction on the basis that during the course of his trial a juror had submitted an employment application in the district attorney's office and that prosecutors, upon learning of the application, withheld this fact from the trial court and defense counsel until after trial. At a post-trial hearing the trial judge concluded beyond a reasonable doubt that the misconduct did not influence the jury. The conviction was affirmed in state court, but the District Court granted a writ of habeas corpus on the question and the Second Circuit affirmed. This Court reversed, concluding that due process does not require a new trial every time a juror has been placed in a compromising position.

In *Rushen* v *Spain*, ____ US ____; 78 L Ed 2d 267, 273; 104 S Ct ____ (1983), citing *Smith* v *Phillips*, *supra*, this Court stated that:

> "... the Constitution does not require a new trial every time a juror has been placed in a potentially compromising situation ... [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."

Rushen dealt with a claim of prejudice from an *ex parte* communication between a juror and the trial court which related to some aspect of the trial and which was not disclosed to trial counsel. This Court concluded, 78 L Ed 2d Ct 274, that the prejudicial effect of such an event could normally be determined at a post-trial hearing and that the substance of the *ex parte* communication and its effect on juror impartiality are questions of historical fact entitled to the deference requirement of § 2254(d). *See, Sumner* v *Mata,* 449 US 539 (1981); *Sumner* v *Mata* 455 US 591, 598 (1982).

The standard to be applied in cases of alleged juror bias was set forth in *Chandler* v *Florida,* 449 US 560 (1981). Appellants in *Chandler* were convicted of various theft crimes at a jury trial which was partially televised under Florida Law. They claimed the atmosphere created by televising the proceedings would prejudice them by influencing the jurors, thereby precluding a fair trial. This Court concluded that due process required the opportunity to show that the ability of the jurors to decide the case on the merits was impaired. *Id.* at 581.

Those cases stand for the rule that, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences, and to determine the effect of such occurrences when they happen." *Smith* v *Phillips, supra,* 455 US at 217.

In this case after *voir dire* of the jury, the trial court found that as a matter of historical fact that the jury was not prejudiced or biased as a result of Respondent's counsel's conduct. The trial court also found that the jury was willing to determine the case only on the evidence. Thus, due process was satisfied.

In *Strickland, supra,* 80 L Ed 2d at 691, this Court stated that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. This Court held that both a deficient performance by counsel *and* prejudice of the type that deprives a defendant of a fair trial must be shown before a violation of the Sixth Amendment right to the effective assistance of counsel is shown. *Strickland, supra,* 80 L Ed 2d at 693, 696.

In this case, the Michigan Court of Appeals as part of its review of the entirety of the proceedings, including the ineffective counsel claim, concluded that "a skillful defense was conducted." Although this determination rests upon factual conclusions it is, by and large, a legal conclusion. To that extent it is not binding in a federal court in a habeas corpus proceeding under § 2254(d); *Strickland* v *Washington, supra,* 80 L Ed 2d ct 700.

However, the trial court made a factual determination that must be accorded deference under § 2254(d). Trial counsel requested the court to conduct a hearing to determine whether any juror "had been prejudiced or biased because of the conduct, in any way, or the attorneys . . ." (TII, Vol IV, P 8; App. 33a). The trial judge then cautioned the panel to decide the case on the merits of the evidence presented and not on any other basis. The trial court then re-inquired whether anything had occurred which would prevent a fair determination of the case. No juror indicated that either the past conduct of the attorneys or that any other event which occurred during trial, other than the evidence presented, would affect their determination. The trial court thereupon made the finding that the conduct of the attorneys, in particular the conduct of Respondent's attorney, did not prejudice or bias the jury, and that the conduct would not prevent the jury from

reaching a verdict based solely on the evidence. (TII, Vol IV, P 12, App. 37a).

The Court of Appeals' analysis of the effect of Respondent's attorney's conduct during trial ignores the findings of historical fact rendered by the trial court. These findings are entitled to the presumption of correctness under § 2254(d) and this Court's teaching in *Smith* v *Phillips* and *Rushen* v *Spain, supra.* No claim is made that the *trial court's findings* were not fairly supported by the record. 28 USC 2254(d), (g). Further, the Court of Appeals' decision appears to provide for a *per se* rule of prejudicial upon a finding of any "conflict." This inflexible approach was disapproved in *Strickland* and this Court specifically counseled that no such automatic approach be taken in determining whether due process, i.e., a fair trial, has been denied. *Strickland* v *Washington, supra,* 80 L Ed 2d at *696.*

Further, Petitioner believes that the Court of Appeals' decision may inadvertently provide a societally unacceptable, inflexible rule which can be used to extricate a criminal defendant from the consequences of a trial when the evidence is strong, the case not going well or when he is before a judge he desires to avoid. Rewarding trial counsel's misbehavior by granting a writ of habeas corpus gives tacit approval to those trial counsel who would show disrespect to a court by carrying their disagreements with a court's ruling before the jury in an effort to frustrate the trial itself or avoid the effect of adverse pre-trial rulings. Appellate rulings which even inadvertently encourage such attorney misconduct should be disapproved. *cf. Engle* v *Issac,* 456 US 107 (1982) (f 34); *Wainwright* v *Sykes,* 433 US 72, 89, 90 (1977) where the court criticized trial counsel "sandbagging" objections.

Finally, this case presents an issue of attorney misconduct, not "conflict of interest." When analyzed as "attorney mis-

conduct", the initial focus in a habeas corpus inquiry is whether state courts have made a determination regarding the effect of the misconduct on the trial. If there has been a finding of fact regarding the effect of the misconduct upon the jury, such as the one made herein by the trial court, then that finding must be given deference under 28 USC 2254(d). *Smith* v *Phillips, supra; Rushen* v *Spain, supra.* Here no prejudice was found by the trial court; thus the habeas court's inquiry should end.

However, even when analyzed as a Sixth Amendment due process claim of ineffective counsel, the two-pronged test of *Strickland* v *Washington, supra,* requires that both deficient performance (here, actual conflict of interest) and prejudice (denial of a fair trial) must be affirmatively shown. The record shows neither that Respondent's counsel abdicated presenting a skillful, well chosen defense, nor that his misbehavior actually prejudiced respondent.

Hence, Petitioner submits that in this case, under either approach, Respondent is not being held in custody in violation of the laws or treaties of the United States, that the decision of the Court of Appeals is erroneous, and should be reversed.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit; in the alternative, the case should be remanded to the Sixth Circuit Court of Appeals for reconsideration of the prejudice component in view of this court's decision in *Strickland* v *Washington, supra.*

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Thomas A. Kulick
Assistant Attorney General

Business Address:

Corrections Division
Criminal Appeals Section
Plaza One Building
401 S. Washington Square
Lansing, MI 48913

Telephone: (517) 373-3474

DATED: August 27, 1984

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-1046

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROY WILSON, *Petitioner-Appellant,* v. BARRY MINTZES, *Respondent-Appellee.*	On Appeal from the United States District Court for the Eastern District of Michigan

Decided and Filed May 4, 1984

Before: Engel, Martin and Contie, Circuit Judges.

Contie, Circuit Judge. Petitioner Roy Wilson, a prisoner at the State Prison of Southern Michigan at Jackson, appeals from the district court's dismissal of his petition for a writ of habeas corpus. 28 U.S.C. § 2254. The issue presented is whether the petitioner was deprived of effective assistance of counsel when the trial judge denied petitioner's repeated requests for substitute counsel. We conclude that, on the facts of this case, the trial court should have allowed petitioner to retain new counsel and thus we reverse the district court.

The petitioner had been previously convicted by a jury of

carnal knowledge of a female over 16, M.C.L.A. 750.520, in February 1974. The Michigan Supreme Court, however, reversed this conviction on the grounds that the petitioner should have been given a reasonable continuance following the prosecution's late endorsement of two expert witnesses. *People* v. *Wilson*, 397 Mich. 76, 83 (1976). Prior to the second trial, petitioner filed a motion to disqualify the original trial judge from rehearing the case. This motion was denied by an alternate judge.

On the second day of the second trial, the record indicates that a serious verbal altercation took place between the trial judge and defendant's retained counsel shortly after defense counsel began his cross-examination of Sgt. Audrey Martini, the officer in charge of the investigation. Defense counsel began his cross-examination by asking the officer for a copy of the search warrant which the officer had used to seize certain pieces of incriminating evidence. The officer replied that the warrant was in the court's file. After a brief exchange between the trial judge and defense counsel, the judge excused the jury and then asked defense counsel when he "last looked at the Court file for this case." Defense counsel replied that he had never looked at the actual court file, but that he had made an extensive review of his office file for the case. At that point, the trial judge expressed his concern over defense counsel's lack of preparation and asked petitioner if he wanted to discharge his lawyer "as being incompetent". When petitioner answered that he did not wish to continue with his attorney, the trial judge asked petitioner to state his reasons for wanting substitute counsel. Petitioner replied that he wanted new counsel because his attorney "hasn't prepared for the case." The trial judge did not rule on petitioner's request, but rather denied defense counsel's subsequent request to leave the courtroom in order to make a phone call. In response, defense counsel became very agitated and repeatedly expressed his belief that he would be arrested if he left the

courtroom.[1] After denying defense counsel's request for a mistrial, the trial judge brought the jury back into the courtroom and instructed the prosecutor to continue the trial.

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[1]

The text of this exchange is reproduced in pertinent part below:

THE COURT: You wish to discharge your lawyer as being incompetent?

DEFENDANT WILSON: You asked me did I wish to continue with this attorney and I said no.

THE COURT: Why? State your reasons on the record. He had not prepared the case well?

DEFENDANT WILSON: No he hasn't prepared the case—prepared for the case.

THE COURT: He what?

DEFENDANT WILSON: He hasn't prepared for the case.

THE COURT: Do you have money to hire another lawyer? We have a question of incompetency of Counsel—

DEFENDANT WILSON: I My family may—

THE COURT: Is your family here?

DEFENDANT WILSON: Yes.

THE COURT: Mr. Patterson, don't call out.

MR. PATTERSON: You're telling me I can't use the phone?

THE COURT: I'm telling you that during the trial, you can't use the phone in the course of a trial. Mr. Patterson, do not leave the area of the courtroom.

Now Mr. Wilson, are you prepared to discharge your lawyer? I have a problem. I have been reversed three times for incompetence of Counsel. I don't know how to solve the question. Each one has to be handled on its own merits. I find here a lawyer who is trying his third or fourth capital case, two years of experience; never bothered to check the court file; didn't start his preparation until yesterday when he asked the Prosecutor for a search warrant.

We have a firm that's been on this case for over a year as I recall—

MR. PATTERSON: I should state for the record that the firm of Stone, Richardson, Greer and Allen represents this man and if he discharges me personally, fine. I should also state for the record that the Court has made statements to this man that he has answered yes or no to and I don't care what the Court happens to believe, Mr. Wilson—and I don't know what the motive for the Court is. The fact that this Court has been reversed before is not

Defense counsel, however, continued to state that he was under arrest and that the jury should be so informed. Defense counsel also refused to cross-examine Sgt. Martini and indi-

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my problem but as far as I'm concerned, I have properly prepared for this case and unless I'm a criminal defendant myself all of a sudden, I don't understand what the problem is.

THE COURT: Well at least on three occasions the Supreme Court has said, "Judge Gillis, you should not have let that trial go on with incompetent Counsel. This man was not properly represented".

Now, I'm asking Mr. Wilson—

MR. PATTERSON: That's your opinion.

THE COURT: I am saying, the record discloses for one that you've never looked at the court file.

MR. PATTERSON: Nor any other court file.

THE COURT: Two, you've had only two years of experience and this is your third or fourth capital trial. You didn't ask the Prosecutor for the search warrant until yesterday after the trial was in progress or the day of the trial.

MR. PATTERSON: I would like the record to reflect that our office has had this case for at least two years that I know of before I was ever there. And that all of this has been discussed and the opinions and the research done by our office by two different attorneys other than myself and that I have read our file and that Counsel did not feel it was necessary to go up and look at the court file.

THE COURT: Mr. Wilson, he's the boss. Do you wish to continue this trial with this law firm?

MR. PATTERSON: I don't think the question is the law firm; I think the question is this lawyer?

THE COURT: And this lawyer in particular?

MR. PATTERSON: Not 'and this lawyer'; this lawyer period. That's the question.

THE COURT: All right; that's the question Mr. Wilson.

MR. WILSON: Can I confer with my family?

THE COURT: Yes, you can talk to your family.

MR. PATTERSON: Can I go make a telephone call?

THE COURT: No, you will not. What do you have to make a phone call about? You're committed to this trial—

MR. PATTERSON: Since all of a sudden I'm a defendant, if I

cated that (1) he refused to continue the trial and (2) he was no longer petitioner's attorney. At that point, court was adjourned for the day.[2]

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make a move these Police Officers are going to arrest me and you can hold me for contempt and put me in the Wayne County Jail.
THE COURT: That is not so–
MR. PATTERSON: If I walk out this door, the Court is not going to put me in jail or fine me because if you tell me yes, I'm going out that door.
THE COURT: I am saying the Court has ordered you–
MR. PATTERSON: Am I under arrest? Am I under Arrest?
THE COURT: I said do not leave this courtroom.
Mr. Wilson, you can talk to your family.
MR. PATTERSON: Don't answer another question.
I don't believe that you can hold me in this courtroom against my will, not and conduct this kind of proceeding and damn it if I don't move for a mistrial on the basis of the statements made here in front of me, my client, the Prosecutor, the Judge and the jury.
THE COURT: Nothing has been said in front of the jury about this.
MR. PATTERSON: This is the most illegal I have ever seen in my life; your holding me here against my will. You're telling me I can't walk out that door and I'm under Court order to stay here. That's just what you just said, right? And you can enforce your orders by criminal contempt proceedings. And if I walk out that door one of these Officers can arrest me and shoot me if he wants to.
THE COURT: Do you want to continue the trial Mr. Wilson?
MR. PATTERSON: I don't; I move for a mistrial.
THE COURT: The motion is denied.

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[2]

The text of this exchange reads as follows:
THE COURT: Bring out the jury; we'll continue the trial.
MR. PATTERSON: We're not going to continue the trial.
THE COURT: Bring out the jury. Sit down Mr. Patterson.
MR. PATTERSON: I want the record to show that I'm being detained in this courtroom.
(Jury returned to courtroom)

The following day, prior to the jury's admission to the courtroom, the petitioner expressed his belief that he could not get a fair trial due to the previous day's altercation. The trial judge replied that the jury "was not here when that took place," and further stated that "[i]f [defense counsel] had properly prepared and read the court file, he would not have asked [certain questions]." This statement triggered a new exchange between the trial judge and defense counsel regarding defense counsel's preparation for the case. Following this exchange, petitioner again indicated that he was not satisfied with his attorney due to "the events that took place yesterday." The court again stated that the incident took place outside the presence of the jury and the trial proceeded. Petitioner was later found guilty of rape and received a life sentence. The Michigan Court of Appeals affirmed his conviction and the

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MR. PATTERSON: They have a right to know.
THE COURT: You may continue Mr. LaBret; as soon as the jury is seated.
MR. PATTERSON: Tell them I am under arrest. Tell them I am under arrest and I can't leave this courtroom. Tell the jury that because they have a right to know.
THE COURT: Mr. Patterson is not under arrest; he's not under any sanctions of the Court.
MR. PATTERSON: Am I ordered to stay here in this courtroom?
THE COURT: You are the attorney of record.
Continue the trial Mr. LaBret.
MR. PATTERSON: I refuse—I'm telling the jury right now, I refuse to conduct this case in this courtroom after what has been said by the Court to my client while the jury was in the jury box.
THE COURT: Continue the trial, Mr. Patterson.
MR. PATTERSON: I am making no further objections; I remove myself from the case. I remove myself from the case.
THE COURT: Mr. Patterson—
MR. PATTERSON: He doesn't have an attorney.
THE COURT: Mr. Patterson, have a seat.

Michigan Supreme Court denied petitioner's application for leave to appeal. Petitioner then filed a petition for a writ of habeas corpus, which the district court denied in June 1981. Petitioner appeals.

Although an essential element of a criminal defendant's sixth amendment right to effective assistance of counsel is the right to retain an attorney of the defendant's choice, *Linton* v. *Perini*, 656 F.2d 207, 208-09 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *United States* v. *Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979), this right is not absolute. "The right 'cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same'." *United States* v. *Burton*, 584 F.2d at 489. Accordingly, "[i]n order to warrant a substitution

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MR. LA BRET: Your Honor, I've turned the witness over to Mr. Patterson.

THE COURT: Mr. Patterson, do you have any questions of this witness?

MR. PATTERSON: I am no longer this man's attorney. If the Court is going to conduct a trial in this fashion, I am no longer the attorney.

THE COURT: Do you have any questions of this witness?

MR. PATTERSON: Mr. Jamison, Mr. Allen, you can arrest me if he tells you to arrest me. If I walk out this door. I know damn well I can be arrested when I walk out that door.

THE COURT: Are you going to continue the trial?

MR. PATTERSON: No.

THE COURT: Do you have any questions of this witness?

MR. PATTERSON: I move for a mistrial.

THE COURT: Motion denied.

Call the next witness.

MR. LA BRET: I believe that concludes our witnesses, your Honor, for today. We have two or three witnesses who will conclude our portion of the trial.

THE COURT: Ladies and gentlemen of the jury. Return to this courtroom at 9:00 o'clock and we'll continue the trial tomorrow.

of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict." *United States* v. *Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). *See United States* v. *Welty*, 674 F.2d 185, 188 (3rd Cir. 1982); *Maynard* v. *Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *United States* v. *Young*, 482 F.2d 993, 995 (5th Cir. 1973). The petitioner must also demonstrate that he was prejudiced by his attorney's performance. *Hindman* v. *Wyrick*, 702 F.2d 148, 152 8th Cir. 1983); *Owens* v. *Wainwright*, 698 F.2d 1111, 1113 (11th Cir.), *cert. denied*, ——— U.S. ———, 104 S. Ct. 117 (1983); *United States* v. *Sullivan*, 694 F.2d 1348, 1349 (2d Cir. 1982); *United States* v. *Baynes*, 687 F.2d 659, 670 (3rd Cir. 1982). Finally, it is well settled that when a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction. *See Hudson* v. *Rushen*, 686 F.2d 826, 829 (9th Cir. 1982), *cert. denied*, ——— U.S. ———, 103 S. Ct. 1896 (1983); *McKee* v. *Harris*, 649 F.2d 927, 933 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982), *United States* v. *Hart*, 557 F.2d 162, 163 (8th Cir.) *cert. denied*, 434 U.S. 906 (1977); *United States* v. *Young*, 482 F.2d at 995; *Sawicki* v. *Johnson*, 475 F.2d 183, 184 (6th Cir. 1973). Such an inquiry is necessary if the court is to determine whether good cause for substitution of counsel exists. *United States* v. *Welty*, 674 F.2d at 188.

When petitioner enunciated his reasons for his dissatisfaction with counsel, the record indicates that the trial judge was already engaged in an ongoing verbal altercation with defense counsel and thus the court made only a perfunctory, surface inquiry to determine the truth and scope of petitioner's allegations. While the trial court's failure to make a thorough inquiry is not in and of itself a sixth amendment violation, we hold that petitioner did in fact have good cause to request new counsel and that the trial court's denial of petitioner's request

deprived petitioner of his sixth amendment right to effective assistance of counsel.

We note at the outset that the state appellate court's ultimate finding that petitioner had effective counsel is not entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). *Adams* v. *Jago*, 703 F.2d 978, 980 (6th Cir. 1983). Such a conclusion is legal in nature and is freely reviewable by this court.[3] *Id.* We also note that while petitioner's request for new counsel came during the trial, there is no evidence that petitioner's request was contrived for purposes of delay. *See United States* v. *Welty*, 674 F.2d at 190. During the verbal altercation between the trial judge and defense counsel, the record indicates that defense counsel became extremely agitated at the trial judge's comments and essentially sought to protect himself rather than the interests of his client. Although most of the altercation took place outside the presence of the jury, the jury was present when defense counsel stated that (1) he refused to make any further objections, (2) he refused to continue the trial, and (3) he was no longer petitioner's attorney. Although we agree with the state court of appeals that the conduct of the trial judge was, a times, abrasive, we nevertheless hold that defense counsel's attempt to remove himself from the case in front of the jury was inexcusable and prejudicial. Defense counsel also chose to continue his heated exchange with the trial judge rather than cross-examine the police officer in charge of the investigation. That defense counsel failed to cross-examine a key government witness is further evidence that he was, at that time, unwilling or unable to protect the interests of his client. In short, we hold that

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We recognize, of course, that the findings of fact which underlie the ultimate question of whether petitioner received effective assistance of counsel are entitled to a presumption of correctness under § 2254(d). *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (Sumner II); *Adams* v. *Jago*, 703 F.2d at 980. We reiterate, however, that the ultimate conclu-

this conduct, along with petitioner's unheeded statements of dissatisfaction with his counsel, evidence an irreconcilable conflict between the interests of defense counsel and petitioner which prejudiced petitioner's case and thus deprived petitioner of his sixth amendment right to effective assistance of counsel. In light of our holding on petitioner's effective assistance of counsel claim, we do not address petitioner's claim that he was denied a fair trial due to bias on the part of the trial judge.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED to the district court with instructions to grant the writ of habeas corpus.

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sion to be drawn from such findings regarding the effectiveness of counsel's assistance is legal in nature and thus not subject to the statutory presumption set forth in § 2254(d). *Adams* v. *Jago*, 703 F.2d at 980.

FILED
JUN 22 1984
JOHN P. HEHMAN, Clerk

No. 83-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY WILSON, Petitioner-Appellant, vs. BARRY MINTZES, Respondent-Appellee.	

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: ENGEL, MARTIN and CONTIE, Circuit Judges.

A majority of the court having not voted in favor of an *en banc* rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman /s/
Clerk

FILED
JUL 12 1984
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 83-1046

ROY WILSON, Petitioner-Appellant VS. BARRY MINTZES, Respondent-Appellee	

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE
COURT
JOHN P. HEHMAN, CLERK
John P. Hehman /s/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROY WILSON, Petitioner, v. BARRY MINZES, Respondent.	CIVIL ACTION NO. 80-73037

MEMORANDUM OPINION

Petitioner, Roy Wilson, presently a prisoner at the State Prison of Southern Michigan at Jackson, brings this application for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. He was convicted in Detroit Recorder's Court December 9, 1976, of carnal knowledge of a female over 16, M.C.L.A. 750.520; M.S.A. 28.788. The Michigan Court of Appeals affirmed his conviction on November 8, 1978. The Michigan Supreme Court denied Petitioner's delayed application for leave to appeal on October 1, 1979.

Petitioner was first convicted on this charge on February 1, 1974. Although the Court of Appeals affirmed this conviction, the Michigan Supreme Court reversed and remanded for a new trial for "denial of a reasonable continuance to allow the defendant. . .to prepare to meet an unexpected indorsement of two. . .expert witnesses on the date set for trial. . . ." Petitioner's second trial was again before Detroit Recorder's Court Judge, Joseph A. Gillis.

Petitioner's habeas application challenges the fairness of his second trial on the following grounds:

1. The alternate judge erred in denying Petitioner's motion to disqualify his original trial judge.

2. The trial judge showed bias against Petitioner and defense counsel.

3. The trial court erred in failing to hold a full evidentiary hearing on the matter of competency of defense counsel.

Petitioner contends, with regard to ground one, that he was denied a fair trial because the alternate judge improperly ruled on his motion to disqualify his original trial judge. He makes this allegation on the basis that, (1) a review of the transcripts of his first trial indicates bias on the part of the trial judge, and (2) the alternate judge should have disqualified herself from hearing this motion as she was the Principal Attorney of Research, Training and Appeals for the Prosecutor's office and received and reviewed briefs of Petitioner's appeal from his first trial.[1]

The Michigan Court of Appeals found no bias or prejudice on the part of the trial judge sufficient to meet state law standards of reversal, and further stated:

> Nor have we been presented with a showing of bias or prejudice in fact exhibited by the alternate judge. Although her name appeared as principle attorney in charge of research and writing for the prosecutor's office, there is no evidence from the record or otherwise that she actually participated in defendant's case during the original appeal. (Citations omitted.)

People of the State of Michigan v. Roy Wilson, Ct.Apps. no. 77-613, at 2, (November 8, 1978).

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[1]

The Prosecutor's file received by this Court indicates that the alternate judge was the attorney signing the notice to Detroit Police Headquarters of the filing of the Prosecutor's brief on Petitioner's first appeal. Dated July 24, 1974.

Petitioner's third claim stems from an inflamatory exchange between the trial judge and defense counsel; much of which took place outside the hearing of the jury. (Trial Transcript, Vol. II, December 7, 1976, 97-109). This incident arose when defense counsel requested to look at a copy of the search warrant prepared by the prosecutor. The court admonished counsel that the warrant was available in the court file, located on the eleventh floor of the building. The prosecutor offered to give counsel a copy, the court indicated that would be helpful and excused the jury. (Trial Transcript, Vol. II, at 98). Upon learning that defense counsel had not looked at the court file itself, the trial judge questioned the defendant/petitioner as to whether he was aware of this fact. Counsel indicated to the judge that his firm had been responsible for the case for some time, that he had read their complete file and had seen the search warrant previously, and that he merely wanted to view a copy at that time. (Trial Transcript, at 99). The subsequent exchange became heated when the court inquired whether defendant/petitioner wanted counsel to continue to represent him and whether he could afford new counsel. Defendant/Petitioner indicated that he did not want his current counsel to continue to represent him, counsel refused to continue the trial and, moved for a mistrial. The trial judge denied the motion and called the jury back. (Trial Transcript, at 105-106). The following exchange then transpired in the presence of the jury:

> THE COURT: Bring out the jury; we'll continue the trial.
>
> MR. PATTERSON: [Defense counsel] We're not going to continue the trial.
>
> THE COURT: Bring out the jury. Sit down Mr. Patterson.

MR. PATTERSON: I want the record to show that I'm being detained in this courtroom.

(Jury returned to courtroom)

MR. PATTERSON: They have a right to know.

THE COURT: You may continue Mr. LaBret; as soon as the jury is seated.

MR. PATTERSON: Tell them I am under arrest. Tell them I am under arrest and I can't leave this courtroom. Tell the jury that because they have a right to know.

THE COURT: Mr. Patterson is not under arrest; he's not under the sanctions of the Court.

MR. PATTERSON: Am I ordered to stay here in this courtroom?

THE COURT: You are the attorney of record.

Continue the trial Mr. LaBret.

MR. PATTERSON: I refuse—I'm telling the jury right now, I refuse to conduct this case in this courtroom after what has been said by the Court to my client while the jury was in the jury box.

THE COURT: Continue the trial, Mr. Patterson.

MR. PATTERSON: I am making no further objections; I remove myself from the case. I remove myself from the case.

THE COURT: Mr. Patterson—

MR. PATTERSON: He doesn't have an attorney.

THE COURT: Mr. Patterson, have a seat.

MR. LA BRET: Your Honor, I've turned the witness over to Mr. Patterson.

THE COURT: Mr. Patterson, do you have any questions of this witness?

MR. PATTERSON: I am no longer this man's attorney. If the Court is going to conduct a trial in this fashion, I am no longer the attorney.

THE COURT: Do you have any questions of this witness:

MR. PATTERSON: Mr. Jamison, Mr. Allen, you can arrest me if he tells you to arrest me. If I walk out this door. I know damn well I can be arrested when I walk out that door.

THE COURT: Are you going to continue the trial?

MR. PATTERSON: No.

THE COURT: Do you have any questions of this witness?

MR. PATTERSON: I move for a mistrial.

THE COURT: Motion denied.

Call the next witness.

MR. LA BRET: I believe that concludes our witnesses, your Honor, for today. We have two or three witnesses who will conclude our portion of the trial.

> THE COURT: Ladies and gentlement of the jury. Return to this courtroom at 9:00 o'clock and we'll continue the trial tomorrow.
>
> (Whereupon the jury was excused from courtroom at 3:58 o'clock P.M.)
>
> (Hearing adjourned until 9:00 o'clock on Wednesday, Decmeber 8, 1976)

(Trial Transcript, 106-109).

Petitioner contends that the trial court's failure to hold a full hearing on the issue of competency denied him a fair trial. The state Court of Appeals considered this claim, as well as a claim of error for failure to declare a mistrial, and found the following:

> The granting of a mistrial is within the sound discretion of the trial court, [. . .] and the court's discretionary decision will not be set aside unless a resulting prejudice to the defendant is demonstrated. A careful reading of this record demonstrates no prejudice to the defendant arising out of the court's refusal to grant a mistrial. The inflamatory exchange between the court and counsel occurred in substantial part out of the presence of the jury. It would appear that any dispute that existed between the court and defense counsel was resolved when counsel continued with the trial the following morning.
>
> However, the troublesome issue remains. The trial court asked the defendant twice if he was satisfied with counsel and both times received a negative answer. In *People v. Wilson, supra,* the Court held that a defendant was entitled to substitution of appointed counsel for "good cause" and where the judicial process would not be dis-

rupted. While counsel in the instant case was retained, no less a standard would seem to apply. Further, *Wilson* also indicated that the application of this substitution standard was left to the discretion of the court. Here, although the judge raised the competency issue and the defendant indicated his agreement with the court's seeming dissatisfaction with counsel, the following day the trial continued without either the court or defendant pursuing the concerns raised earlier in the proceedings. Thus, it would appear that both the court and the defendant had resolved their doubts in favor of counsel. We have reviewed the record and find that a skillful defense was conducted. It is noted that defendant is still represented by the same firm, proper briefs have been filed for his appeal, and oral argument was exceedingly well presented in the matter.

Considering the lack of demonstrable prejudice to defendant's case by the court's failure to hold a hearing on the issue of competency, we decline to set aside the jury's decision where there was sufficient evidence to support their findings. We do so acknowledging that the court, in general, was abrasive, but noting that its conduct was not reserved for defendant and his attorney alone.

Affirmed.

People of the State of Michigan v. Roy Wilson, supra, at 3.

Federal habeas corpus relief is available to a state prisoner "only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States, 28 U.S.C. Section 2254(a) (1970)." *Tiitsman v. Black,* 536 F.2d 678, 681 (6th Cir. 1976). A claim for federal habeas relief must therefore allege a "fundamental defect which inherently results in a miscarriage of justice [or] omission inconsistent with the rudimentary demands of fair procedure." *DeBerry v. Wolff,*

513 F.2d 1336, 1338 (8th Cir. 1976), citing *Hill v. United States*, 368 U.S. 424, 428 (1962); see, *Hayton v. Egeler*, 555 F.2d 299, 604 (6th Cir. 1977).

Further, in *Sumner v. Mata*, —— U.S. ——, 28 Cr. L. 3061, (January 21, 1981), the United States Supreme Court held that 28 U.S.C. Section 2254(d),[2] which provides a

[2]

28 U.S.C. Section 2254(d) provides, in part:

"(d) In any proceeding instituted in a Federal court an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or an agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

presumption of correctness of state court findings, applies to a state appellate court's factual findings made from the state court trial record. *Sumner v. Mata*, 28 Cr.L. at 3063. The court went on to state:

> A writ issued at the behest of a petition under 28 U.S.C. Section 2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted, and friction is likely to result. . . . But it is clear that in adopting the 1966 amendments, Congress in Section 2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of the seven (sic) conditions specifically set forth in Section 2254(d) was found to exist by the federal habeas court.

Sumner v. Mata, 28 Cr.L. at 3064. Pursuant to this requirement we find that the state court's determinations, with one exception,[3] do not fall into any of the 8 categories set forth in Section 2254(d).

Although the state appellate court did not deal directly with the Petitioner's dissatisfaction and objections to defense

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[3]

The state appellate court, in its opinion dated November 8, 1978, concluded that, because the trial "continued without either the court or the defendant pursuing the concerns [of competency] raised earlier in the proceedings," " it would appear that both the court and defendant had resolved their doubts in favor of counsel." *Id.* at 3. The record of the trial indicates that the defendant did make his dissatisfaction clearly known before the court proceeded with the trial, and that the court chose not to respond with any change. (Trial Transcript, Vol. III, at 2). The conclusion reach by the appellate court with regard to this troublesome issue is not fairly supported by the record." 28 U.S.C. Section 2254(d)(8).

counsel, it dealt indirectly with the problem when it found that "a skillful defense was conducted." *People v. Wilson,* Docket No. 77-613, November 8, 1978.

With this in mind, we must determine whether the above occurrences and irregularities of petitioner's trial amounted to a constitutional violation, i.e., whether petitioner was denied the "rudimentary requirements of a fair trial."[4] *Brinlee v. Crisp,* 608 F.2d 839, 853 (10th Cir. 1979). After reviewing the record of petitioner's first trial, we do not find that the decision of the alternate judge in denying petitioner's motion for substitution as fundamentally unfair. Nor do we find that petitioner was constitutionally unprotected from the irregularities of his second trial. The trial proceeded without further incident, and extensive instructions were given by the trial court regarding the deliberative duties of the jury. (Trial Transcript, December 9, 1976, 49-60). The state appellate court concluded that a skillful defense was conducted, *People v. Wilson, supra,* and we find no violations that resulted in a constitutionally unfair trial. Nor do we find this case to be similar to those determined so prejudicial to fall outside the bounds of fairness under even a more rigorous standard of review. *See, United States v. Hickman,* 592 F.2d 931 (6th Cir. 1979), *United States v. Kelley,* 314 F.2d 401 (6th Cir. 1963), *United States v. Koenig,* 300 F.2d 377 (6th Cir. 1962).

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[4]

As noted in *United States ex rel. Perry v. Cuyler,* 584 F.2d 644, 645 (3rd Cir. 1978), because this is a collateral attack on a state court conviction, our sole standard of review is whether there has been a violation of the Constitution. . .28 U.S.C. Section 2254(a). We cannot exercise the supervisory powers, or enforce the more rigorous standards that exist directly for review of federal trial court proceedings.

For the above reasons, the petition for a writ of habeas corpus will be denied. An appropriate order will be issued.

Charles W. Joiner /s/
CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

DATED: June 9, 1981

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ROY WILSON, Defendant-Appellant.	NOV 08 1978 Docket #77-613

Before: Bronson, P.J., M.J. Kelly and D.C. Riley, JJ.

PER CURIAM

Defendant, Roy Wilson, was found guilty by a jury of carnal knowledge of a female over the age of 16, MCL 750.520; MSA 28.788, and sentenced to life imprisonment on February 14, 1974. The Supreme Court reversed this Court's affirmance of his conviction and remanded for a new trial on the grounds that defendant should have been allowed a reasonable continuance because of the late endorsement of

expert witnesses for the prosecution. *People* v *Wilson*, 397 Mich 76; 243 NW2d 257 (1976).

Prior to the second trial defendant filed a motion to disqualify the original trial judge from rehearing the case, which the alternate judge denied. Defendant proceeded to trial where he was found guilty by a jury on the same offense and was sentenced to life imprisonment on December 9, 1976. He appeals as of right.

Defendant's first two assertions concern the possible bias and prejudice of the trial judge in both the first and second trial, and of the alternate judge who denied the motion to disqualify.

A trial judge may be disqualified when he "is personally biased or prejudiced for or against any party or attorney". GCR 1963, 405.1(3), *Kolowich* v *Ferguson*, 264 Mich 668, 670; 250 NW 875 (1933), *People* v *Moran*, 36 Mich App 730, 733; 194 NW2d 555 (1971), or when the necessities of justice demand a change. *Kolowich, supra*. Furthermore, bias or prejudice cannot be based solely upon decisions in the due course of judicial proceedings. *Mahlen Land Corp* v *Kurtz*, 355 Mich 340, 350; 94 NW2d 888 (1959). *Crowley Milner & Co* v *Circuit Court Judge*, 239 Mich 605, 613; 215 NW 29 (1927). Defendant's citations of alleged bias, including the failure to update the presentence report, when read in context of the entire transcript, do not meet these standards. Nor have we been presented with a showing of bias or prejudice in fact exhibited by the alternate judge. Although her name appeared as principal attorney in charge of research and writing for the prosecutor's office, there is no evidence from the record or otherwise that she actually participated in defendant's case during his original appeal. See *Armstrong* v *Ann Arbor*,

58 Mich App 359; 227 NW2d 343 (1975), *People* v *Moran, supra.*

Defendant next maintains that after the court raised the issue of defense counsel's competency and defendant indicated that he was not satisfied with his lawyer, it erred in not granting a mistrial or holding a full hearing on the competency issue.

The granting of a mistrial is within the sound discretion of the trial court, *People* v *Talaga*, 37 Mich App 100, 102; 194 NW2d 462 (1971), and the court's discretionary decision will not be set aside unless resulting prejudice to the defendant is demonstrated. A careful reading of this record demonstrates no prejudice to the defendant arising out of the court's refusal to grant a mistrial. The inflamatory exchange between the court and counsel occurred in substantial part out of the presence of the jury. It would appear that any dispute that existed between the court and defense counsel was resolved when counsel continued with the trial the following morning.

However, the troublesome issue remains. The trial court asked the defendant twice if he was satisfied with counsel and both times received a negative answer. In *People* v *Wilson, supra,* the Court held that a defendant was entitled to substitution of appointed counsel for "good cause" and where the judicial process would not be disrupted. While counsel in the instant case was retained, no less a standard would seem to apply. Further, *Wilson* also indicated that the application of this substitution standard was left to the discretion of the court. Here, although the judge raised the competency issue and the defendant indicated his agreement with the court's seeming dissatisfaction with counsel, the following day the trial continued without either the court or defendant pursuing the concerns raised earlier in the proceedings. Thus, it

would appear that both the court and the defendant had resolved their doubts in favor of counsel. We have reviewed the record and find that a skillful defense was conducted. It is noted that defendant is still represented by the same firm, proper briefs have been filed for his appeal, and oral argument was exceedingly well presented in the matter.

Considering the lack of demonstrable prejudice to defendant's case by the court's failure to hold a hearing on the issue of competency, we declare to set aside the jury's decision where there was sufficient evidence to support their findings. We do so acknowledging that the court, in general, was abrasive, but noting that its conduct was not reserved for defendant and his attorney alone.

Affirmed.

(TII, Vol II) [97]

CROSS EXAMINATION

BY MR. PATTERSON:

Q Officer, do you have the search warrant that was exercised in this matter? That you prepared—do you have it?

A Do I have it?

Q Yes?

A I believe the Court has it in the file.

MR. PATTERSON: Could I see it please?

THE COURT: The Court file is on the 11th floor in the Court Record Room.

MR. PATTERSON: Am I to be understood that I cannot see the search warrant?

THE COURT: I'm saying that anybody in the entire world can go up to the 11th floor and ask for the Court file; it's been up there for four years—for three years. It's just like any other file.

MR LA BRET: I have a copy, your Honor—

THE COURT: Do you have a copy?

MR. LA BRET: I do have a copy if that would be of assistance.

[98]

THE COURT: The Court file is just like any other file and anybody in the building can go up and look at that file. Just go sign your name and address.

MR. LA BRET: Would that be helpful if I gave him a copy?

THE COURT: Maybe that would help.

Will the jury retire to the jury room.

(Jury excused from courtroom)

THE COURT: Mr. Patterson, how long has your office been the attorney of record in this case?

MR. PATTERSON: I don't know.

THE COURT: Well, when have you last looked at the Court file for this case?

MR. PATTERSON: When have I last personally looked at it?

THE COURT: Yes?

MR. PATTERSON: I've never looked at the Court file on this case.

[99]

THE COURT: You have never checked the court file prior to this trial?

MR. PATTERSON: No I have not.

THE COURT: Have you attempted to do—check the search warrant?

MR. PATTERSON: Our file in our office on this case is almost a half a foot thick and I have gone through every item that appeared in the file in our office. I have seen this search warrant before. This is what I have made a request for. I did not want the original; the copy was satisfactory to me.

THE COURT: When did you make a request for it?

MR. PATTERSON: I saw it yesterday.

THE COURT: Mr. LaBret gave it to you after the trial started?

MR. PATTERSON: He did, before.

THE COURT: But I want to find out.

Mr. Wilson, are you aware that your lawyer in this firm has never looked at the Court file?

MR. PATTERSON: Wait a minute. I object to that on the

basis that I cannot say what [100] the other people in my office have done.

THE COURT: You have not looked at this Court file?

MR. PATTERSON: I personally have not, no.

THE COURT: Well, why have you not?

MR. PATTERSON: Because I felt that what was in my file in my office was satisfactory; no, I've never looked at any court files in any case I've ever handled.

THE COURT: How long have you been a lawyer?

MR. PATTERSON: I've been practicing for almost two years.

THE COURT: How many criminal trials, capital, carrying life imprisonment, have you tried in the two years?

MR. PATTERSON: I believe three.

THE COURT: Mr. Wilson, you have heard your attorney indicate that this is his third or fourth criminal trial. You have heard your attorney indicate he has never checked the court record in this case. Are you willing to continue with this lawyer in view of—

[101]

MR. PATTERSON: May I ask him something?

THE COURT: Yes, you may ask him something.

(Discussion off the record)

DEFENDANT WILSON: No.

THE COURT: You wish to discharge your lawyer as being incompetent?

DEFENDANT WILSON: You asked me did I wish to continue with this attorney and I said no.

THE COURT: Do you have money to hire another lawyer? We have a question of incompetency of Counsel —

DEFENDANT WILSON: My family may —

THE COURT: Is your family here?

DEFENDANT WILSON: Yes.

[102]

THE COURT: Mr. Patterson, don't call out.

MR. PATTERSON: You're telling me I can't use the phone?

THE COURT: I'm telling you that during the trial, you can't use the phone in the course of a trial. Mr. Patterson, do not leave the area of the courtroom.

Now Mr. Wilson, are you prepared to discharge your lawyer? I have a problem. I have been reversed three times for incompetence of Counsel. I don't know how to solve the question. Each one has to be handled on its own merits. I find here a lawyer who is trying his third or fourth capital case, two years of experience; never bothered to check the court file; didn't start his preparation until yesterday when he asked the Prosecutor for a search warrant.

We have a firm that's been on this case for over a year as I recall —

MR. PATTERSON: I should state for the record that the firm of Stone, Richardson, Greer and Allen represents this man and if he discharges me personally, fine. I should also state for the record that the Court has made statements to this man that he has answered yes or no to and I don't care what the Court [103] happens to believe, Mr. Wilson — and I don't know what the motive for the Court is. The fact that this Court has been reversed before is not my problem but as far as I'm concerned, I have properly prepared for this case and unless I'm a criminal defendant myself all of a sudden, I don't understand what the problem is.

THE COURT: Well at least on three occasions the Supreme Court has said, "Judge Gillis, you should not have let that trial go on with incompetent Counsel. This man was not properly represented".

Now, I'm asking Mr. Wilson —

MR. PATTERSON: That's your opinion.

THE COURT: I am saying, the record discloses for one that you've never looked at the court file.

MR. PATTERSON: Nor any other court file.

THE COURT: Two, you've had only two years of experience and this is your third or fourth capital trial. You didn't ask the Prosecutor for the search warrant until yesterday after the trial was in progress or the day of the trial.

MR. PATTERSON: I would like the record to reflect that

our office has had this case for at least two years that I know of before I was ever there. [104] And that all of this has been discussed and the opinions and the research done by our office by two different attorneys other than myself and that I have read our file and that Counsel did not feel it was necessary to go up and look at the court file.

THE COURT: Mr. Wilson, he's the boss.

Do you wish to continue this trial with this law firm?

MR. PATTERSON: I don't think the question is the law firm; I think the question is this lawyer?

THE COURT: And this lawyer in particular?

MR. PATTERSON: Not 'and this lawyer'; this lawyer period. That's the question.

THE COURT: All right; that's the question Mr. Wilson.

MR. WILSON: Can I confer with my family?

THE COURT: Yes, you can talk to your family.

MR. PATTERSON: Can I go make a telephone call?

[105]

THE COURT: No, you will not. What do you have to make a phone call about? You're committed to this trial—

MR. PATTERSON: Since all of a sudden I'm a defendant, if I make a move these Police Officers are going to arrest me and you can hold me for contempt and put me in the Wayne County Jail.

THE COURT: That is not so—

MR. PATTERSON: If I walk out this door, the Court is not going to put me in jail or fine me because if you tell me yes, I'm going out that door.

THE COURT: I am saying the Court has ordered you—

MR. PATTERSON: Am I under arrest? Am I under arrest?

THE COURT: I said do not leave this courtroom.

Mr. Wilson, you can talk to your family.

MR. PATTERSON: Don't answer another question.

I don't believe that you can hold me in this courtroom against my will, not and conduct this kind of proceeding and damn it if I don't move for a mistrial on the basis of the statements made here [106] in front of me, my client, the Prosecutor, the Judge and the jury.

THE COURT: Nothing has been said in front of the jury about this.

MR. PATTERSON: This is the most illegal I have ever seen in my life; your holding me here against my will. You're telling me I can't walk out that door and I'm under Court order to stay here. That's just what you just said, right? And you can enforce your orders by criminal contempt proceedings. And if I walk out that door one of these Officers can arrest me and shoot me if he wants to.

THE COURT: Do you want to continue the trial Mr. Wilson?

MR. PATTERSON: I don't; I move for a mistrial.

THE COURT: The motion is denied.

MR. LA BRET: Mr. Wilson's mother just walked into the courtroom, your Honor.

MR. PATTERSON: And I've indicated to my client, who I still represent; I have not been discharged, not to answer anything—nobody's questions.

THE COURT: Bring out the jury; we'll continue the trial.

[107]

MR. PATTERSON: We're not going to continue the trial.

THE COURT: Bring out the jury. Sit down Mr. Patterson.

MR. PATTERSON: I want the record to show that I'm being detained in this courtroom.

(Jury returned to courtroom)

MR. PATTERSON: They have a right to know.

THE COURT: You may continue Mr. LaBret; as soon as the jury is seated.

MR. PATTERSON: Tell them I am under arrest. Tell them I am under arrest and I can't leave this courtroom. Tell the jury that because they have a right to know.

THE COURT: Mr. Patterson is not under arrest; he's not under any sanctions of the Court.

MR. PATTERSON: Am I ordered to stay here in this courtroom?

THE COURT: You are the attorney of record.

Continue the trial Mr. LaBret.

[108]

MR. PATTERSON: I refuse—I'm telling the jury right now, I refuse to conduct this case in this courtroom after what has been said by the Court to my client while the jury was in the jury box.

THE COURT: Continue the trial, Mr. Patterson.

MR. PATTERSON: I am making no further objections; I remove myself from the case. I remove myself from the case.

THE COURT: Mr. Patterson—

MR. PATTERSON: He doesn't have an attorney.

THE COURT: Mr. Patterson, have a seat.

MR. LA BRET: Your Honor, I've turned the witness over to Mr. Patterson.

THE COURT: Mr. Patterson, do you have any questions of this witness?

MR. PATTERSON: I am no longer this man's attorney. If the Court is going to conduct a trial in this fashion, I am no longer the attorney.

THE COURT: Do you have any questions of this witness?

[109]

MR. PATTERSON: Mr. Jamison, Mr. Allen, you can arrest me if he tells you to arrest me. if I walk out this door. Iknow damn well I can be arrested when I walk out that door.

THE COURT: Are you going to continue the trial?

MR. PATTERSON: No.

THE COURT: Do you have any questions of this witness?

MR. PATTERSON: I move for a mistrial.

THE COURT: Motion denied.

Call the next witness.

MR. LA BRET: I believe that concludes our witnesses, your Honor, for today. We have two or three witnesses who will conclude our portion of the trial.

THE COURT: Ladies and gentlemen of the jury. Return to this courtroom at 9:00 o'clock and we'll continue the trial tomorrow.

(Whereupon the jury was excused from courtroom at 3:58 o'clock P.M.)

(Hearing adjourned until 9:00 o'clock on Wednesday, Dec. 8, 1976)

(TII, Vol III)

[2]

December 8, 1976

Detroit, Michigan

THE COURT: Continuation of Roy Wilson case.

MR. PATTERSON: Before you bring the jury out, I have a motion. There's something I want to put on the record.

THE COURT: All right.

You may proceed Mr. Patterson.

Mr. Patterson, do you have any more questions of Sergeant Martini?

MR. PATTERSON: I have no other questions of the Sergeant. I believe my client wants to make a statement.

DEFENDANT WILSON: I just want to say that I believe the events that took place yesterday; I believe they affected the trial.

THE COURT: They what?

DEFENDANT WILSON: They affected this trial to some degree and I don't think I really would have a fair trial.

THE COURT: The jury was not here when that took place.

(TII, Vol III) [7]

MR. PATTERSON: That's right.

THE COURT: And at that time I wanted to bring that to Mr. Wilson's attention because I think the minimum of any lawyer's preparation is to look at the court file.

MR. PATTERSON: And I also indicated on the record yesterday, I had read our file and that I had read our file twice.

THE COURT: All right. This all took place outside the presence of the jury. The jury was not tainted in any way by the statements.

DEFENDANT WILSON: The jury saw what happened, what went on.

THE COURT: The record will show — the jury heard some statements made by your lawyer, not by the Court.

MR. LA BRET: May I proceed sir?

THE COURT: You may proceed. Put your first witness on.

Bring out the jury.

(Jury returned to courtroom)

(TII, Vol IV)

[8]

denied, being a fact question.

You may proceed, Mr. Patterson.

MR. PATTERSON: I would like some time to talk with my client because of events just coming to my attention.

THE COURT: All right, the jury will retire to the jury room, and do not discuss this case at this time.

MR. PATTERSON: Your Honor, I request that the jury be voir dired with respect to events that took place on Tuesday, as to whether or not they heard anything that would prejudice them in deciding this case

THE COURT: I will give them instructions.

Any requests for instructions?

Who has got the transcript of the first trial?

Is the Defendant going to take the stand?

MR. PATTERSON: No.

THE COURT: Do you want me to comment on it?

MR. PATTERSON: Yes.

THE COURT: Put on the record, the [9] basis of your request.

MR. PATTERSON: It is very simple.

From the point of view of testimony with respect to the gun, there probably would not be any assault and battery, because I don't believe that there was an offensive touching. But, the complainant testified that he put his arm around her, and that could possibly be considered assault and battery.

With respect to assault to commit rape, there was testimony at one point by Ms. Coleman, that no rape took place, and then she changed her mind and said that there was.

I believe the element for the lesser included offenses would possibly be correct.

THE COURT: Mr. LaBret?

MR. LABRET: Your Honor, no, because after the truth is drawn out about the victim, it is the best evidence when she told the Court and Jury what happened.

The assault with intent to rape would be assault without completion of the act.

THE COURT: We have testimony from two witnesses that the act of rape was completed and there was penetration.

[10]

MR. PATTERSON: We also have a second witness who testified, initially, that there was no—

MR. LABRET: (Interposing) She said that she didn't see him insert his penis into her vagina, and when I questioned her, and showed her the transcript wherein she said, under oath, in the last trial that, indeed, this did occur, she suddenly regained her memory and testified to the truth.

THE COURT: I think that we have evidence of two witnesses, and nothing to the contrary that there was—that the act was not completed, and I would deny your request for any included offenses.

Anything else?

MR. PATTERSON: Nothing, other than voir diring the jury.

THE COURT: Bring out the jury.

Ladies and gentlemen of the jury, I previously instructed you that the questions that the attorneys ask are not evidence, and the evidence is the answers supplied by the witnesses. Likewise, prior to starting this trial, I told you that an attorney had a duty to make objections, and then it is the duty of the Court to rule on the objections, and I wish to emphasize the conduct of the attorney for the other side [11] should not reflect upon the client.

You should decide this case not on what that attorney asks, what the attorney says, the attorneys' arguments, and questions, but, the case should be decided solely upon the testimony of the witnesses, and the six exhibits that have been

admitted into the case, or seven exhibits that have been admitted into this case.

Have any members of the jury been prejudiced or biased because of the conduct, in any way, of the attorneys, during the course of this trial, either one side or the other, anything that the attorneys have done, that would effect your decision?

Would you all reach and decide this case solely upon the evidence, the testimony of the witnesses, not the arguments of the attorneys, and, certainly, the arguments are to direct your attention to the evidence, but the evidence, itself, that is what you are concerned with, and not the arguments.

We just had an outburst from a spectator, and would that effect you in any way, or if she had any connection with this case, it may be another case entirely, because we have another jury trial in progress going on in this Court at this time, not at the same minute, but we have two juries sitting at the present time, and witnesses from both cases are present.

[12]

All right. Would the jury—has there been anything that has taken place during the course of the trial that would affect you from deciding this case fairly and justly without any bias or prejudice?

Apparently not.

You may proceed, Mr. Patterson.

MR. PATTERSON: At this time, your Honor, the defense would like to call Sara Patterson to the stand.

No relationship.

SARA PATTERSON having first been duly sworn in by the Clerk, was examined, and testified upon her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PATTERSON:

Q Witness, would you state your full name?

A Sara Patterson.

Q Please speak into the microphone.

Ms. Patterson, what is your address?

A 2438 Baldwin.

Q In Detroit?

A Yes.

Q Have you ever seen or talked to me before today?

(TII, Vol IV)

[40]

you on this matter, that the defendant does not have to put forth any evidence at all. That it is the duty of the prosecutor to put forth his case, and prove his case to your satisfaction beyond a reasonable doubt.

There is no need and nothing in the law that requires Mr. Wilson to take the stand.

Mr. LaBret pointed out to you the fact that Ethel Mills was a prostitute and that she was involved with drugs.

Well, I see that as being the crux of this matter. The fact that she was a prostitute from 1968 up to 1973 is crucial.

The fact that she would use drugs is crucial, and the fact that on the morning of this alleged offense, she had used drugs is also crucial, and the fact that, as she testified, she prostituted, to support her habit, that there were children with her, apparently, with her mother, that she was incapable of taking care of them — the defense does not deny that the act took place. But, what the defense does deny is that this was an act of force, and that this was against this woman's will, and that it lacked her consent.

There is no question that, taking the character of the complainant, that that is an essential

ORIGINAL

84-346

Supreme Court, U.S.
FILED
OCT 6 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

vs. No. _____

ROY WILSON,

Respondent.
_____/

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN R. MINOCK (P 24626)
Attorney for Respondent
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

JURISDICTION

The jurisdictional statement of the Petitioner is adequate.

QUESTIONS PRESENTED

I. Whether this case is so unique and limited to its facts that it will affect few others than the litigants and therefore does not involve any important questions of federal law.

II. Whether the decision of the Sixth Circuit was correct in finding that Respondent was denied the right to be represented by counsel of his own choice when the trial court refused to allow Respondent to obtain substitute counsel in mid-trial when defense counsel angrily announced to the jury that he was quitting the case.

III. Whether it is appropriate for Petitioner, the State of Michigan, to raise for the first time before this Court an argument which was not presented to the federal courts below regarding whether the trial court made a finding of fact which is entitled to the presumption of correctness under 28 USC §§2254(d).

STATEMENT OF THE CASE

Respondent Roy Wilson was convicted of raping the complainant, Ethel Mills, who admitted that she was a prostitute and heroin addict. She also admitted that she had shot heroin earlier on the day of the alleged rape, October 11,

1973, that she was suffering from withdrawal on the night of the alleged rape, and that she was allegedly kidnapped while walking to a friend's home where there was heroin. She denied that she solicited Mr. Wilson (T II, Vol. II, pp. 30-39).[1]

Except for those parts of the Petitioner's Statement of the case which are argumentative and conclusory, the Petitioner's Statement adequately summarizes the facts in the case. The quarrels between defense counsel and the trial judge and the colloquies between the trial judge and the Respondent should, however, be examined in their entirety (T II, Vol. II, pp. 97-109; Petitioner's App. 26a-36a; Vol. III, pp. 2-7) Respondent's App. 1b-6b).

ARGUMENT

I. NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BECAUSE THE DECISION OF THE SIXTH CIRCUIT TURNS UPON THE UNIQUE FACTS OF THIS CASE AND IS NOT LIKELY TO AFFECT OTHERS THAN THE LITIGANTS.

In this case the trial judge initiated a quarrel with defense counsel over an insignificant point. During cross-examination of the officer in charge of the case, defense counsel asked to see the search warrant, and was inter-

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[1] The letter "T" refers to the trial transcript, the Roman numeral "I" to the first trial, the Roman numeral "II" to the second trial, the Roman numeral following "Vol." to the volume of the transcript, and the Arabic numbers to the page numbers.

rupted by the judge who told him saracastically he could get the file from the 11th floor of the court building (T II, Vol. II, pp. 97-98). The judge excused the jury and questioned defense counsel about his preparation of the case (T II, Vol. II, pp. 98-100). After the judge suggested that defense counsel was inadequately prepared, he asked the defendant if he wanted to continue with counsel as his lawyer, and the defendant twice said no (T II, Vol. II, pp. 100-101). The judge asked if he could afford new counsel, and the defendant requested to talk to his family (T II, Vol. II, pp 101-104). Defense counsel threatened to leave the courtroom and moved for a mistrial, which the judge denied (T II, Vol. II, pp. 104-107). The jury was brought back in, and in their presence defense counsel said he was under arrest, that he was no longer representing the defendant, that he refused to continue the trial because of some unspecified things said to the defendant by the judge while the jury was out, refused to complete the cross-examination of the officer in charge, and requested a mistrial in front of the jury. The judge denied that and told the prosecutor to call his next witness, but the prosecutor tactfully declined and was granted an adjournment to the next day (T II, Vol. II, pp. 107-109).

When trial resumed the next day, the defendant himself said repeatedly that he was not satisfied with his lawyer and thought that the outbursts in front of the jury had prejudiced his right to a fair trial, implicitly requesting a

mistrial, but the judge completely ignored him (T II, Vol. III, pp. 2-7).

The Sixth Circuit held that on the circumstances of this case, Respondent had good cause to request to hire new counsel even though the trial was in progress. The court found that Respondent was not at fault, that he was prejudiced by his attorney's petulant outburst before the jury, and that in that outburst counsel abandoned his client's interests and was protecting himself instead. Petitioner's assertion that this case has far-reaching implications because it will encourage criminal defense lawyers to engage in unprofessional conduct when a case is going badly is ridiculous. That assertion is belied by the infrequency with which facts of this sort ever result in a claim of error on appeal.[2] Since the decision below is limited to the facts of this case, it does not warrant review by this Court.

II. THE SIXTH CIRCUIT CORRECTLY FOUND THAT RESPONDENT WAS DENIED THE RIGHT TO BE REPRESENTED BY COUNSEL OF HIS OWN CHOICE.

The Sixth Circuit found that because defense counsel improperly sought to resign from the case in mid-trial, and behaved "inexcusably" in front of the jury, Respondent had good cause to ask to retain new counsel, and the trial court

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[2] In all of this counsel's research, there were no reported cases found which involved misconduct of this nature.

should have heeded Respondent's repeated requests.[3] (Petition, App. 8a-9a). As the Court said:

> [W]e hold that petitioner did in fact have good cause to request new counsel and that the trial court's denial of petitioner's request deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

Petitioner has restated the issue here as one of effective assistance of counsel which requires analysis of counsel's actual performance under Strickland v Washington, _____US _____, 80 L Ed 2d 674, 104 S Ct _____ (1984). However, the issue is not so much one of "effectiveness" as it is deprivation of the right to counsel of one's own choice.

In Strickland, this Court recognized that when a defendant is deprived of counsel, prejudice is presumed. 80 L Ed 2d at 696. See also, Holloway v Arkansas, 435 US 475, 489 (1978); Glasser v United States, 315 US 60, 75-76 (1941). As this Court said in Faretta v California, 422 US 806, 821 (1975):

> An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

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[3] The Sixth Circuit did use the terms "effective assistance of counsel" and "conflict of interest" in describing its holding. Respondent maintains, however, that under a closer analysis, this is a deprivation of the right to counsel case, not an ineffective assistance of counsel issue.

When Respondent was refused an opportunity to retain new counsel, he was deprived of his right to counsel of his own choosing. Prejudice is presumed in these circumstances, because representation by an unwanted counsel is akin to no representation at all. Linton v Perini, 656 F 2d 207 (CA 6, 1981), cert. den., 454 US 1162 (1982). Prejudice is only a relevant factor in substitution of counsel cases in determining whether a defendant had good cause to request substitution in the first place. Linton v Perini, supra. Once it is determined that a defendant has good cause for substitution, counsel's actual performance is irrelevant if unwanted counsel is forced upon the defendant. The Sixth Circuit thus focused its attention here on the facts leading to Respondent's request to hire a new lawyer and did not address the claims that the rest of counsel's performance was ineffective raised as alternative grounds for relief in Respondent's brief below. (See petitioner Wilson's Sixth Circuit brief, pp. 21-24, Respondent's App. 7b-11b).

The holding of the Sixth Circuit that Respondent was prejudiced and therefore justified in seeking substitution of counsel is obviously correct. Trial counsel abandoned his client to protect his injured pride. Contrary to Petitioner's assertion, it is clear from the context of the trial transcript that counsel's refusal to resume the cross-examination of Officer Martini was due to a temper tantrum, not a tactical choice (T II, Vol. II, pp. 107-109). That refusal to continue questioning, however, was just one of the reasons for

the Sixth Circuit decision that counsel's conduct was prejudicial. The rest of counsel's angry outburst in front of the jury was prejudicial too. The jury was sent out when the judge started the quarrel with counsel, and much of the argument took place while the jury was out (T II, Vol. II, pp. 97-106). The judge brought the jury back in when defense counsel was still obviously angry at the court's unnecessary goading and insults. When counsel told the jury he was quitting the case, he said in part:

> I refuse - I'm telling the jury right now, I refuse to conduct this case in this courtroom after what has been said by the Court to my client while the jury was in the jury box [sic]. (T II, Vol. II, p. 108).

The jury could thus have easily concluded that it was Respondent who had done something improper to stir up this hornet's nest, not the lawyer and the judge. The Sixth Circuit properly concluded that on these facts Respondent should have been allowed to obtain new counsel, and Petitioner has not demonstrated that this conclusion was in error or merits review.

III. THE PETITION IMPROPERLY RAISES FOR THE FIRST TIME AN ARGUMENT THAT WAS NOT PRESENTED TO THE FEDERAL COURTS BELOW.

The Michigan Court of Appeals said that when trial resumed on the day after defense counsel's outburst, the defendant apparently resolved his dissatisfaction with defense

counsel, because he did not pursue the matter further. This statement is obviously wrong because when trial resumed, Respondent said four times that he was dissatisfied with his lawyer's conduct and that it had prejudiced his right to a fair trial (T II, Vol. III, pp. 2-7). The District Court noted the error of that conclusion and found it was not entitled to a presumption of correctness under 28 USC §§2254(d)(8), because it was not supported by the record (Memorandum Opinion, Petitioner's App. 21a).

In the Sixth Circuit, Petitioner argued that the conclusion of the Michigan appellate court that Respondent had effective consel was entitled to the presumption of correctness. The Sixth Circuit rejected this argument on the grounds that such conclusions are not entitled to the presumption, because they are legal and not factual in nature, which is consistent with Strickland, supra.

Petitioner now abandons that argument and, for the first time, advances in this Court the argument that the trial court made a finding that Respondent was not prejudiced which is entitled to the presumption. Since this argument was not presented to the federal courts below, it should not be entertained for the first time here. Steagald v United States, 451 US 204, 208 (1981); Raper v Mintzes, 706 F 2d 161 (CA 6, 1983).

Even if this court were to entertain that argument now, the finding of no prejudice by the trial court is not fairly supported by the record. Two days after defense

counsel's outburst, the trial judge instructed the jury that they should not be affected by the conduct of an attorney. He then asked the jury a leading question whether they were prejudiced by the conduct of the attorneys in the case. Not surprisingly, no juror responded (T II, Vol. IV, pp. 10-12; Petitioner's App. 40a-41a). As Respondent argued in the Sixth Circuit, the brief and leading nature of the voir dire, following as it did the cautionary instruction that the jurors should not be prejudiced, did nothing to cure the prejudice. The cases cited by Petitioner regarding juror bias are distinguishable on the depth of the questioning of the jurors as well as on the nature of the prejudice involved. This issue also does not merit review.

CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to review the decision of the Sixth Circuit, and a remand for reconsideration under Strickland v Washington, supra, is unnecessary.

Respectfully Submitted:

JOHN R. MINOCK (P 24626)
Attorney for Respondent
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

Dated: October 4, 1984.

APPENDIX

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EXCERPT OF TRANSCRIPT OF TRIAL PROCEEDINGS
December 8, 1976

December 8, 1976

Detroit, Michigan

THE COURT: Continuation of Roy Wilson case.

MR. PATTERSON: Before you bring the jury out, I have a motion. There's something I want to put on the record.

THE COURT: All right.

You may proceed Mr. Patterson.

Mr. Patterson, do you have any more questions of Sergeant Martini?

MR. PATTERSON: I have no other questions of the Sergeant. I believe my client wants to make a statement.

DEFENDANT WILSON: I just want to say that I believe the events that took place yesterday; I believe they affected the trial.

THE COURT: They what?

DEFENDANT WILSON: They affected this trial to some degree and I don't think I really would have a fair trial.

THE COURT: The jury was not here when that took place.

The question was whether your lawyer had properly prepared. I was trying to protect your rights. It became evident during the trial that your lawyer was asking questions. If he had properly prepared and read the court file, he would not have asked them.

MR. PATTERSON: Now let me make this statement for the record. I think that remark obviously is the opinion of the Court in terms of my preparation for this case. Our office -- I have had an opportunity to talk tothe partners in our office and our office was retained three years ago in this case. And this case was taken to the Court of Appeals and the Supreme Court by our office and the case was reversed in the Supreme Court as this Court knows.

Now in the process of having done that, our office had made copies of the court file. I indicated on the record yesterday that I had read the transcript twice and I had read our file twice, which is my standard preparation in every case.

THE COURT: My concern was, you had never looked at a court file in your life.

MR. PATTERSON: That is correct; at a court file upstairs.

THE COURT: All right. And it became evident yesterday --

MR. PATTERSON: Let me also say this --

THE COURT: You also never checked the search warrant file and you had no idea what file room the search warrants were kept in.

MR. PATTERSON: I don't believe that is true either. I think the Court indicated that the search warrant was in the court file.

THE COURT: No --

MR. PATTERSON: That is what the Court indicated.

THE COURT: It is in the court file room.

MR. PATTERSON: Okay. That's not what I understood --

THE COURT: The search warrant has a different number. Trial files are kept on the ninth floor. Search warrants are kept in a seperate file room on the 11th floor and it was evident that you were not aware that they were in two seperate files. It became evident that you had never gone up and looked for them. However, it did come out on the record that the Prosecutor had furnished you a copy --

MR. PATTERSON: At my request.

THE COURT: -- a copy of the search warrant yesterday the second day of trial.

MR. PATTERSON: I believe I saw the search warrant before the case ever started.

MR. LA BRET: Your Honor, I believe that before the case ever began I showed Mr. Patterson a copy of the search warrant.

MR. PATTERSON: I should also say there's a copy of the search warrant in our file in our office.

THE COURT: But the fact remains that you wanted to see it from the file and it's not in the file. It's a separate document; a separate file number kept in a separate location in the file rooms on the 11th floor.

MR. PATTERSON: Let me also say this. I know exactly what the search warrant had said and I knew what the return said before I ever asked for it.

MR. LA BRET: I think perhaps we had a gross misunderstanding.

MR. PATTERSON: It had to do with panties and panty hose.

THE COURT: All right. Are we ready to proceed today?

MR. LA BRET: Yes sir, we are.

THE COURT: And you're satisfied with your lawyer, Mr. Wilson?

MR. PATTERSON: Let me make one last statement. I want to get this in the record --

DEFENDANT WILSON: No. I made a statement that I wasn't satisfied.

THE COURT: You're what?

DEFENDANT WILSON: I am not satisfied with the events that took place yesterday.

THE COURT: You may not be satisfied -- I'm trying to protect your rights, Mr. Wilson. When I found out your lawyer, one, had never read the court file; two --

MR. PATTERSON: Upstairs.

THE COURT: Upstairs, although he may have a complete copy in his office; he probably does have but I'm not sure.

MR. PATTERSON: The Court's calling me a liar?

THE COURT: No, I'm not calling you a liar; I said you have never read the original court file. You made that statement on the record.

MR. PATTERSON: That's right.

THE COURT: And at that time I wanted to bring that to Mr. Wilson's attention because I think the minimum of any lawyer's preparation is to look at the court file.

MR. PATTERSON: And I also indicated on the record yesterday, I had read our file and that I had read our file twice.

THE COURT: All right. This all took place outside the presence of the jury. The jury was not tainted in any way by the statements.

DEFENDANT WILSON: The jury saw what happened, what went on --

THE COURT: The record will show -- the jury heard some statements made by your lawyer, not by the Court.

MR. LA BRET: May I proceed sir?

THE COURT: You may proceed. Put your first witness on.

Bring out the jury.

(Jury returned to courtroom)

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EXCERPT FROM RESPONDENT ROY WILSON'S
SIXTH CIRCUIT BRIEF ON APPEAL

reason his lawyer was trying to quit as to conclude it was the lawyer's or judge's fault. The fact that the judge conducted a brief, leading voir dire of the jury the next day on the subject of courtroom altercations would not have removed the prejudice. (T.II, Vol. IV, pp. 11-12).

The alternatives open to the trial court when the defendant requested a mistrial so that he could replace his lawyer were: 1) grant the mistrial; 2) deny the mistrial and allow a continuance to see if new counsel could be quickly obtained to continue the trial, perhaps another attorney from the same law firm; or 3) force the trial to continue with Mr. Patterson representing the defendant. The only reasonable alternative was to grant the mistrial to allow the defendant to obtain new counsel. Since the requests were by defense counsel and the defendant, double jeopardy problems would not arise because of the defendant's consent. People v. Benton, 402 Mich 47, 260 NW2d 77 (1977). While normally the declaration of a mistrial is within the discretion of the trial court, where the trial court unnecessarily goaded defense counsel into the angry outburst which is the subject of the mistrial request by the defendant, little or no deference should be paid to the trial court's decision. Since there was no reasonable alternative to a mistrial to cure the prejudice, there was a "manifest necessity" to take the case away from the jury. People v. Jackson, 100 Mich App 146, 160 298 NW2d 694 (1980); People v. Walters, 8 Mich App 400, 154 NW2d 542 (1967).

The state Court of Appeals also concluded that no prejudice resulted because a skillful defense was conducted. Mr. Patterson's statement to the jury that he was no longer the lawyer on the case was in complete derogation of his responsibility to his client, hardly a hallmark of a skillful defense. He also failed to cross-examine the officer in charge of the case. He failed

to cite any cases to the court when he requested instructions on lesser included offenses.[2.] (T.II, Vol. IV, p.10). He called a defense witness, Sara Patterson, whose testimony was so damaged by the prosecutor's cross-examination that it made the defense theory of the case seem much weaker. (T.II, Vol. IV, pp. 12-30). Defense counsel, had he adequately interviewed her prior to calling her, should not have put her on the stand. He failed to object to the prosecutor's personal vouching for the character of the complainant.[3.] (T.II, Vol. IV, pp. 35; 44-45). He delivered a brief, perfunctory closing argument in a capital offense. (T. II, Vol. IV, pp. 39-43). He failed to object to several erroneous instructions to the jury.[4.] (T. II, Vol IV, p. 61). He also completely failed to assist the defendant at sentencing. (T.II, Vol. IV, p. 66). Such shortcomings suggest that, contrary to the decision of the Court of Appeals, the defendant was prejudiced by being forced to continue trial with a lawyer who had tried to remove himself from the case

2. Michigan case law at the time of this trial would have warranted giving instructions on the lesser included offenses requested by defense counsel, People v. Alcala, 63 Mich App 120 234 NW2d 172 (1975).

3. The prosecutor's personal vouching for the credibility of the complainant based on his contacts with her between the first and second trials was grossly improper. People v. Perkins, 116 Mich App 624, 629 323 NW2d 311 (1982).

4. The court gave the jury instructions which were apparently drawn from the first trial but which related to evidence that was not presented in the second trial (T. II, Vol. IV, p. 56):

> If you find that before this trial, the defendant made false or deliberate misleading statements, concerning the charge upon which he is now being tried, you may consider such statements as circumstances tending to prove consciousness of guilt. The weight to be given such circumstances, and its significance, if any, are matters for your deliberations. Evidence, that the defendant attempted to persuade a witness to testify falsely to the Police Department may be considered by you as circumstances tending to show consciousness of guilt, and its weight or significance, if any, are matters for your determination.

and effectively did so by putting forth no more than a perfunctory effort after the defendant said he no longer wanted him as defense counsel.[5] The Court of Appeals noted that the defendant was still represented on appeal by the same law firm, but that is of no moment. A different attorney than Mr. Patterson handled the case there, and the defendant's use of the same law firm on appeal is by no stretch of the imagination a ratification of the conduct of his trial counsel from the same office or a sign that he had resolved his dissatisfaction with him. See United States v. Johnston, supra.

> Evidence that a defendant attempt to suppress evidence by tearing up a piece of paper in his property, may be considered by you. If you find it to be true, of course, and if you believe the witness, it may be considered by you as circumstances tending to show consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

There was no evidence presented in the second trial that the defendant made any statements, though evidence of an exculpatory statement was permitted in the first trial. (T. I, Vol. II, p. 104). There was no evidence at the second trial that the defendant tried to persuade anyone to give a false statement to the police, but evidence that he told Debra Coleman to lie to the police was admitted in the first trial. (T. I, Vol. I, pp. 224-228). There was no evidence in the second trial that the defendant destroyed any evidence, but there was testimony in the first trial that he ate a pice of paper. (T. I, Vol. II, p. 49). Defense counsel objected to none of these instructions.

The judge also gave a muddled and incorrect instruction on the prosecutor's failure to produce the physician who examined the complainant to which defense counsel failed to object. (T. I, Vol. IV, p. 57). Not only did the instruction incorrectly water down the prosecutor's duty to use "due diligence" in locating res gestae witnesses to "reasonable pains", (See People v. Johnson, 51 Mich App 244, 214 NW2d 713 (1974)), but the instruction also failed to tell the jury that if they found a lack of due diligence they could presume that the missing witness would have testified favorably to the defendant. People v. Gibson, 253 Mich 476, 478; 235 NW 225 (1931).

5. Defense counsel's performance earlier in the trial was also not skillful. He failed to file a motion to suppress the defendant's record prior to the second trial. Although such a motion had been denied before the first trial, the judge's ruling was clearly erroneous. See Part II, infra.

Defense counsel also failed to impeach the complainant with her prior testimony that she had been married and divorced (T. I, Vol. I, pp. 106-107 and Vol. II, p. 165 vs. T. II, Vol. II, p. 41); and whether she was a prostitute at the time of the alleged rape (T. I, Vol. I, p. 86 v,s. T. II, Vol. II, p. 33).

Since the conclusions of the state appellate court are not supported by the record and since the defendant was deprived of his fundamental right to counsel, this Court should reverse the decision of the District Court and grant the defendant the relief requested.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

vs. No. _____

ROY WILSON,

Respondent.

_____/ PROOF OF SERVICE

STATE OF MICHIGAN)
: SS
COUNTY OF WAYNE)

ROSE ANN LAWREY, first being duly sworn, deposes and says that pursuant to instructions given by her employer she did on the 4th day of October, 1984, serve a true copy of Motion to Proceed In Forma Pauperis and Brief for Rspondent in Opposition in the above entitled cause upon: Thomas A. Kulick, Assistant Attorney General, Corrections Division, Criminal Appeals Section, Plaza One Building, 401 S. Washington Square, Lansing, MI 48913, by enclosing the same in an envelope properly addressed as aforesaid with sufficient postage prepaid thereon and deposited same in the United States Mails at Detroit, Michigan.

Rose Ann Lawrey

Subscribed and sworn to before me
this 4th day of October, 1984.

Notary Public

EDITH E. KING
Notary Public, Oakland County, MI
My Commission Expires Oct. 2, 1988